TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 639

L. J. BLAKEY (SUCCESSOR TO R. E. SCHUMACHER), RECEIVER OF THE FIRST NATIONAL BANK OF NEW BERN, NEW BERN, NORTH CAROLINA, PETITIONER,

vs.

CHARLES J. BRINSON, ~~RECEIVER~~

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 16, 1932

CERTIORARI GRANTED FEBRUARY 23, 1932

(36,453)

(36,453)

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INDEX

	Original	Print
Record from district court of the United States, Eastern North Carolina	1	1
Stipulation as to transcript of record	1	1
Memorandum as to process, etc	2	1
Complaint	3	2
Answer	8	6
Bill of exceptions	10	8
Testimony of Chas. J. Brinson	10	8
Exhibit "P Ex. 1"—Charge slip	11	9
Exhibit "P Ex. 2"—Entry showing withdrawal	12	9
Exhibit "P Ex. 3"—Deposit slip	13	11
Exhibit "P Ex. 4"—Bond account, bank's ledger sheet	14	12
Exhibit 5—Daily statement	15	12

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	Original	Print
Testimony of R. E. Schumacher	15	13
Exhibit "D Ex. 2"—Clearing house settlement	16	14
Exhibit "D Ex. 3"—Deposit slip	19	16
Exhibit 7—Remittance sheets	21	18
Exhibit "D Ex. 4"—General ledger sheet	22	19
Testimony of Chas. J. Brinson (recalled)	24	20
Motion to dismiss	24	21
Order settling bill of exceptions	24	21
Judgment	25	21
Assignments of error	27	23
Clerk's memorandum	29	25
Clerk's certificate (omitted in printing)	30	
Proceedings in United States circuit court of appeals, fourth circuit	31	26
Docket entries	31	26
Opinion, Parker, J.	32	27
Decree	37	31
Memorandum re mandate	38	32
Clerk's certificate (omitted in printing)	38	
Order allowing certiorari	39	32

[fols. a & 1]

IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NORTH CAROLINA, AT NEW BERN

CHARLES J. BRINSON

vs.

THE FIRST NATIONAL BANK OF NEW BERN, R. E. SCHUMACHER, Receiver

STIPULATION OF COUNSEL AS TO PRINTING TRANSCRIPT OF RECORD—Filed April 27, 1931

It is hereby stipulated and agreed by counsel for all parties to this cause that only the following parts of the transcript of the record herein shall be printed, viz.:

The bill of complaint;

The answer;

Memorandum showing issuance of process, motion for removal from Superior Court of Craven County, to this Court, and filing in this court of transcript;

The bill of exceptions, as settled;

The decree of the Court;

The assignment of errors;

Clerk's certificate;

This stipulation.

It is agreed that the record shall be printed under the supervision of the Clerk of the Circuit Court of Appeals [fol. 2] of the Fourth Circuit, and we agree to be governed by the provisions of rule 23 of that court.

This April 24th, 1931.

Moore & Dunn, Counsel for Complainant. J. O. Carr & J. F. Duncan, Counsel for Defendant.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

[Title omitted]

MEMORANDUM AS TO PROCESS, ETC.

1. Summons issued out of the Superior Court of Craven County, North Carolina, March 19, 1930;

Served on defendant, receiver, with copy of the complaint, March 21, 1930; 30 days for answer from service date;

2. Petition and motion for Removal to United States Court, filed March 29, 1930; removal order March 31, 1930; Transcript of record filed in United States District Court at New Bern, N. C., April 2, 1930;

[fol. 3] 3. By consent order of 24 day of April, 1930, time to plead extended to May 30, 1930;

By consent order May 28, 1930, time to plead extended thirty (30) days from May 30, 1930.

4. Answer filed June 26, 1930.

S. A. Ashe, Clerk, by Geo. Green, Deputy Clerk.

IN SUPREME COURT OF CRAVEN COUNTY

CHARLES J. BRINSON

VS.

THE FIRST NATIONAL BANK OF NEW BERN, R. E. SCHUMACHER, Receiver

COMPLAINT

The plaintiff, complaining of the defendants, says:

1. That the First National Bank of New Bern is a corporation duly organized and existing under the laws of the United States and at the times hereinafter set forth, was conducting a general banking business in the City of New Bern, North Carolina; and the plaintiff is a citizen and resident of Craven County, said State.

2. That on or about the — day of October, 1929, the said The First National Bank closed its doors and was put in liquidation under the laws of the United States, and R. E. Schumacher was duly appointed as Receiver of the aforesaid banking institution by the Comptroller of Currency, and as such Receiver has been engaged and is now engaged [fol. 4] in liquidating the affairs of the aforesaid bank, as this plaintiff is informed and believes.

3. That the said The First National Bank of New Bern as a part of its duties as a general banking institution under the laws of the United States government, undertook from time to time through its officers and agents, to purchase for and deliver to sundry parties who might apply therefor, United States government bonds in such amounts and denominations as might be requested by its customers, and had prior to the times hereinafter set forth so purchased bonds for and delivered the same to this plaintiff.

4. That some time prior to the fourteenth day of October, 1929, this plaintiff advised the aforesaid The First National Bank of New Bern that he desired to purchase four thousand dollars in value of Registered United States Fourth Liberty Loan 4¼% bonds, and the aforesaid bank, through its officers and agents, contracted and agreed to buy such bonds as this plaintiff might require for the plaintiff and deliver the same to him in return for a sum of money for which this defendant then and there agreed to pay for said bonds.

5. That on the fourteenth day of October, 1929, this plaintiff was advised by the aforesaid bank that he could then buy the Registered bonds desired by him without having to pay accrued interest thereon, and this plaintiff delivered to the aforesaid bank the sum of Thirty-nine Hundred and Sixty-four and 60/100 Dollars, ($3964.60) which he was then and there advised was the amount of the cost of said bonds including the interest and commissions thereon for the special purpose of purchasing four thousand dollars in Fourth Liberty Loan 4¼% bonds, as hereinbefore set forth, for this plaintiff, with explicit directions to remit the same to the United States Treasury for the purchase of Registered bonds as aforesaid.

6. That thereafter, to wit: on the nineteenth day of October, 1929, this plaintiff was informed that the bonds theretofore ordered by him had been purchased with the funds aforesaid so designated and directed to be used for such [fol. 5] purpose at a cost of Thirty-nine Hundred and Sixty-four and 60/100 ($3964.60) Dollars, as follows, to wit:

Four Thousand Dollars in Fourth Liberty Loan 4¼% Bonds	$3,960.00
Accrued Interest	.60
Commissions	4.00
Total	$3,964.60

Which said sum of money theretofore placed in the Bank for this special purpose had been applied to such purchase, giving to this plaintiff a statement of said purchase approved by the Cashier of said Bank, but failing and neglecting to deliver to this plaintiff the bonds reported to have been purchased for him.

7. That since the closing of the aforesaid Bank this plaintiff is informed and believes that the aforesaid sum of Thirty-nine hundred and Sixty-four and 60/100 ($3964.60) Dollars, so specially placed in the Bank aforesaid for the purposes as hereinbefore set out, had not been so utilized and the aforesaid Bank wrongfully and unlawfully took and converted the moneys belonging to this plaintiff and placed in said Bank for the special purpose aforesaid, and carried the same to the general cash in the aforesaid Bank and failed and neglected to remit the same or purchase the bonds for this plaintiff as directed.

8. That this plaintiff has demanded of the aforesaid defendant and R. E. Schumacher, Receiver, the return to him of the aforesaid sum of Thirty-nine Hundred and Sixty-four and 60/100 ($3964.60) Dollars so wrongfully and unlawfully misapplied, misappropriated and converted by the defendants, which demand has been refused.

9. That this plaintiff is informed and believes that the defendant has wrongfully and unlawfully commingled the funds belonging to this plaintiff and so placed in the defendant Bank for the purposes aforesaid, with other funds in said Bank, and has wrongfully and unlawfully refused to [fol. 6] deliver the same to this plaintiff, and the said Receiver, wrongfully and unlawfully, continues to refuse to pay over to this plaintiff the moneys and properties lawfully belonging to him.

10. That this plaintiff is informed and believes that the moneys of this plaintiff so placed in said Bank and in the

hands of its officers for the purpose aforesaid, increased and enhanced the value of the assets coming into the hands of the Receiver of the aforesaid Bank to the full amount thereof, and that from and after the date aforesaid to the date of closing of the doors of the said banking institution and the appointment of the Receiver as hereinbefore set out, the aforesaid Bank at all times had sufficient cash on hand and in the bank to pay the aforesaid trust fund so held by it for this plaintiff, and that the funds coming into the hands of the defendant-receiver was impressed with the trust in favor of this plaintiff, and that at all times after the aforesaid trust fund was received by the defendant bank, it had cash on hand to the full amount of the fund herein so wrongfully converted, misapplied and misappropriated by it and held by it in trust for this plaintiff for the purposes hereinbefore fully set fourth.

11. That this plaintiff is informed and believes that the officers of the aforesaid Bank, to wit: W. J. Caroon, Vice-President and Cashier, so taking and receiving the funds of this plaintiff and wrongfully converting, commingling and misapplying the same, were under bond for the due and faithful discharge of their duties as such officers of the Bank aforesaid and this plaintiff has demanded of the Receiver that he disclose the nature of the aforesaid bond and declare the forfeiture thereof to the extent of the amount of the misapplication, as hereinbefore set out, to the end that this plaintiff might make such surety a party hereto, if entitled in law so to do, and the defendant-Receiver might be protected in the payment of the money belonging to this plaintiff as aforesaid, but the aforesaid Receiver has refused to give this plaintiff any information as to the terms of the aforesaid bond or security or the protection which the defendant-Bank had thereunder, or of the amount thereof, or any other information concerning the same ex-
[fol. 7] cept the aforesaid Receiver has informed this plaintiff that said Bank had a bond with a Surety Company for the protection of said Bank against any misconduct of its officers.

Wherefore the plaintiff demands judgment against the defendants:

1. For the sum of Thirty-nine Hundred and Sixty-four and 60/100 ($3964.60) Dollars so wrongfully taken, misappropriated, misapplied and converted by the defendant Bank.

2. That the aforesaid sum be declared to be a trust fund in the hands of said Bank coming into the hands of said Receiver, and said Receiver be directed to pay over the aforesaid sum together with interest thereon as a prior lien and claim for the benefit of the plaintiff out of any funds that have come into his hands as Receiver of said Bank.

3. That the said sum of Thirty-nine Hundred and Sixty-four and 60/100 ($3964.60) Dollars be declared to be a Special Deposit in trust in the aforesaid Bank.

4. For the costs of this action, and for such other and further relief as the plaintiff may be entitled.

H. P. Whitehurst, Moore & Dunn, Attorneys for the Plaintiff.

Duly sworn to by Charles J. Brinson. Jurat omitted in printing.

[fol. 8] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER

Defendant, for answer to the complaint herein, says:

1. Paragraph one of the complaint is admitted;

2. Paragraph two of the complaint is not denied;

3. As to paragraph three of the complaint defendant has no knowledge or information thereof sufficient to form a belief, and therefore denies same: but, it is not denied that said Bank bought bonds, from time to time, for its own account and occasionally for its customers as an accom-odation to them but not as a part of either its duties or obligations imposed by law;

4. As to paragraph four of the complaint defendant has no knowledge or information thereof sufficient to form a belief, and therefore denies same;

5. As to paragraph five of the complaint defendant has [fol. 9] no knowledge or information thereof sufficient to form a belief, and therefore denies same;

6. As to paragraph six of the complaint defendant has no knowledge or information thereof sufficient to form a belief, and therefore denies same;

7. As to paragraph seven of the complaint defendant has no knowledge or information thereof sufficient to form a belief, and therefore denies same;

8. Answering paragraph eight of the complaint defendant admits that plaintiff has demanded of him payment of deposit and that said demand has been refused; all other parts of said paragraph eight are denied. And, it is particularly denied that plaintiff is entitled to such payment as a preference over other depositors in said Bank;

9. Paragraph nine of the complaint is denied;

10. Paragraph ten of the complaint is denied;

11. Answering paragraph eleven of the complaint it is not denied that the First National Bank of New Bern had a bond (denominated "blanket bond") securing said Bank against the misconduct of its officers, of which W. J. Caroon was one, and that defendant informed plaintiff of this fact: Except as admitted paragraph eleven is denied.

And, this defendant has no record or other information of any such bond as indicated by plaintiff, but he is ready, willing and anxious, and will diligently undertake, to avail this Trust of any benefit which may be obtained from such information as plaintiff alleges he has, if furnished this defendant in due form: and defendant asks the Court that plaintiff be required to submit such information that defendant may investigate same and take proper action thereon in the interest of plaintiff and other depositors of said Bank.

Whereupon defendant prays that this action be dismissed, at plaintiff's cost; and that plaintiff be left to his

[fol. 10] remedy of proving his claim as other creditors may prove; for general relief in this premises.

J. O. Carr, J. F. Duncan, Solicitors for Defendant.

Duly sworn to by R. E. Schumacher. Jurat omitted in printing.

IN UNITED STATES DISTRICT COURT

Bill of Exceptions

(Style of court and title omitted)

This cause came on for hearing before the Honorable I. M. Meekins, Judge, Special Term 1930 December, to-wit December 29, 1930, when the following proceedings were had, viz:

CHAS J. BRINSON, complainant, being duly sworn, testified as follows: Sixty six years of age. In October 1929 had money on deposit in First National Bank of New Bern; had done business there thirty years. On October 14, 1929, I drew a check on Eastern Bank & Trust Company for $2100 and deposited it in First National Bank, to finish covering $4000 to buy bonds. Mr. Caroon made all those entries from 14th down and thru those up there (exhibiting witnesses bank book of account kept in First National [fol. 11] Bank. Prior to drawing the check on Eastern Bank & Trust Company I had conversation with Mr. Caroon about purchasing bonds. He had been talking about getting these bonds for four or five months; they were above par until October and I didn't want to pay accrued interest, and first of October they went off a little and on 10th I told him it was time to get those bonds; and he told me to bring the rest of the money there on the 14th of October and he says: "we will send to Richmond to the Federal Reserve Bank, and if they haven't got them, they can send to New York and have them registered in Washington City and you will get them in twelve or fifteen days, and we will hear from them in four or five days. I gave him the $3964.60 and he gave me that receipt (exhibited). It is in Mr. Caroon's handwriting. Then on 15th there was a Gov-

ernment check they sent me for interest on $6000 bonds, $127.50, he entered up next day.

Charge slip, dated October 19, 1929, offered, and marked "P—Ex. 1".

Entry on Bank Book offered, marked "P—Ex. 2," showing $3964.60 was withdrawn from the general deposit October 19th.

P. Ex. 1

The National Bank of New Bern

66-61. New Bern, N. C., Oct. 19, 1929.

This is to advise you that we have this day charged your account as follows:

4,000 Fourth L. L. 4¼% Bonds	3,960.00
Acc. Int.	.60
Commission	4.00
	3,964.60

To Chas. J. Brinson. Address: Savings Account.

Approved by W. J. C., Cashier.

[fol. 12] P. Ex. 2

Date	Checks	Deposits	Interest	Balance
Jan. 1, 1929			28.37	2,866.01
Apr. 1,			28.66	2,894.67
Apr. 10,		5,000.00		7,894.67
Apr. 18,	5,972.00			1,922.67
Jul. 1,			19.22	1,941.89
Oct. 1,			19.42	1,961.31
Oct. 14,		2,100.00		4,061.31
Oct. 15,		127.50		4,188.81
Oct. 21,	3,964.60			224.21
Oct. 25,			.09	224.30

After talking with Mr. Caroon I took $2100 out on my account in Eastern Bank & Trust Company and carried it

to First National Bank; Mr. Caroon told me to bring it on 14th to make up balance of $3900 odd dollars, to buy bonds. I put money there for express purpose of buying bonds; we had talked about it for four or five months. Next day after I deposited that check I asked him if he got that letter off promptly, and he said "yes", it went off on the evening's mail; you will get them in fifteen days. Then on 19th I asked him, and he said: "I have your bonds; come over to the office" and he gave me that slip, and said: "you will get them in eight or ten days now."

After Mr. Schumacher came, the day he took the Bank over I went to Bank; was introduced to Mr. Motter, the Examiner; I showed the slip to him and asked him if my bonds were there; he called Mr. Carron and said: "Mr. Brinson has an account for some bonds, have you these bonds", and he said "No"; and he said: "Did you order them"; and he said "No", sir; he said: Did you collect this money"; he said: "I did"; He said, "What did you do with it"? He said "I charged it off on the cash sheet". This was after bank closed. Mr. Motter carried me in the office; showed slip to Mr. Schumacher; he said he had just taken the bank over and would have to have time on it. I went to Mr. Schumacher several times; got no satisfaction; he said the Comptroller said it should go like the deposits; I wasn't willing to that; I have about $1000 on deposit, checking account; done all my checking business, [fol. 13] for over 35 years or more, with that bank. Mr. Caroon told me on 19th he had the bonds, and gave me that receipt. The day the Bank closed I told Mr. Bland I had receipt for the bonds; next day was Sunday. Monday night I called up Mr. Caroon; asked him if those bonds had come; he said "No" "but he would do all he could for me about them". I found, after a week, that no bonds had been registered in Washington since the 15th.

Cross-examination:

On October 19th he said, when slip was given me, "there is your receipt and you will get your bonds in eight or ten days". I talked with Mr. Caroon Monday, after the Bank closed Saturday. I never got any bonds. Don't know that the money ever went out of the bank.

Redirect examination:

Ordered Fourth Liberty Loan bonds 4¼%, registered.

Plaintiff offers slip (to show this money had been transferred to Bond account in First National Bank; exhibit 3.

Also offers Bank's Ledger Sheet called "Bond account" calling attention to date October 21, 1929; exhibit 4.

Also offers "Daily Statement of the Condition of the Bank October 12th, 1929 up to and including October 25th 1929, showing, "cash on hand", "due from Banks" Exhibited 5.

P. Ex. 3

The First National Bank

Deposited by —— ——.
Bond A/C.

New Bern, N. C., 10/21, 1929.

In receiving items for deposit or collection, this Bank acts only as depositor's collecting agent and assumes no [fol. 14] responsibility beyond the exercise of due care. All items are credited subject to final payment in cash or solvent credits. This Bank will not be liable for default or negligence of its duly selected correspondents nor for losses in transit, and each correspondent so selected shall not be liable except for its own negligence. This Bank or its correspondents may send items, directly or indirectly, to any bank including the payor, and accept its draft or credit as conditional payment in lieu of cash; it may charge back any item at any time before final payment, whether returned or not, also any item drawn on this Bank not good at close of business on day deposited.

	Dollars	Cents
Currency		
Silver		
Gold		
Checks, Bonds		
Chas. J. Brinson	3964	60

P. Ex. 4

Bond Account—Bank's Ledger Sheet

Date	Checks		Deposits	Balance
Jan. 29, 1927	.....	.....	14,500.00	14,500.00
Jan. 31, 1927	.....	.....	419.47	14,919.47
Feb. 1, 1927	4,186.55	.....	.....	10,732.92
Feb. 1, 1927	2,000.00	.....	.....	8,732.92
Feb. 3, 1927	154.76	10,671.36	2,093.20	.00
June 29, 1927	.....	.....	18,000.00	18,000.00
July 1, 1927	15,000.00	.....	.....	3,000.00
July 1, 1927	3,000.00	.....	.....	.00
Jan. 21, 1928	.....	.....	2,846.91	2,846.91
Jan. 24, 1928	.....	.....	10,086.22	12,933.13
Feb. 4, 1928	2,846.91	.....	.....	10,086.22
Feb. 7, 1928	10,086.22	.....	.....	.00
Mar. 27, 1929	.....	.....	5,546.73	5,546.73
Mar. 30, 1929	5,546.73	.....	.....	.00
Aug. 8, 1929	.....	.....	4,016.80	4,016.80
Aug. 20, 1929	.....	.....	10,065.00	.....
.....	.....	.....	3,015.67	17,097.47
Aug. 23, 1929	28.50	.....	.....	17,068.97
Sept. 9, 1929	502.80	.....	.....	16,566.17
Sept. 26, 1929	1,004.00	.....	.....	15,562.17
Sept. 28, 1929	.....	.....	504.15	16,066.32
Sept. 30, 1929	10,065.00	.....	.....	6,001.32
Oct. 17, 1929	.....	.....	991.00	6,992.32
Oct. 21, 1929	.....	.....	3,964.60	10,956.92

[fol. 15] "The plaintiff offered in evidence the Daily Statement of the Condition of the Bank October 12, 1929 up to and including October 25, 1929, for the purpose of showing the cash on hand and due from banks, as shown on said statements, as follows, to wit:

EXHIBIT 5

October 12, Cash on hand	$31,994.93
October 14, Cash on hand	44,947.46
October 15, Cash on hand	36,297.33
October 16, Cash on hand	40,738.00
October 17, Cash on hand	38,356.05
October 18, Cash on hand	35,780.95
October 19, Cash on hand	32,589.51
October 21, Cash on hand	42,232.39
October 22, Cash on hand	43,154.44
October 23, Cash on hand	42,800.74
October 24, Cash on hand	34,842.53
October 25, Cash on hand	27,063.98
October 12, due from Banks	51,435.59
October 14, due from Banks	59,586.68

October 15, due from Banks	62,751.42
October 16, due from Banks	72,340.77
October 17, due from Banks	67,803.25
October 18, due from Banks	43,932.91
October 19, due from Banks	52,118.08
October 21, due from Banks	40,457.60
October 22, due from Banks	29,829.58
October 23, due from Banks	23,594.90
October 24, due from Banks	22,676.95
October 25, due from Banks	31,029.25

Complainant rests.

DEFENDANT'S EVIDENCE

R. E. SCHUMACHER, duly sworn, testified as follows:

Appointed Receiver of First National Bank of New Bern by Comptroller of the Currency; assumed duties November 5, 1929; have records, assets etc. which came into my [fol. 16] hands; have here (exhibits it) ledger sheet showing personal account of Chas. J. Brinson. That sheet, designated account #417, represents the Savings Account of Chas. J. Brinson, for that period. D-Ex. 1—P.-Ex. 2—D. Ex. 1.

Q. Will you please state, reading from that statement offered the transactions with reference to this bond transaction referred to by the plaintiff, giving dates and amounts?

Record shows Mr. Brinson deposited $2100 October 14, 1929.

Q. What became of that $2100?

This is teller's daily sheet and clearance sheet of First National Bank; original records that came into my hands as Receiver; contain items handed by each teller for date of October 14, 1929.

Transactions of 14th are reflected on 15th.

D. Ex. 2

The First National Bank of New Bern

Clearing House Settlement

666. Date: October 15, 1929.

	Eastern Bank & Trust Co. on them			Citizens Bank & Trust Co. on them
.....	.....	.....	.....	6.00
11.34	8.40	4.00	21.30	4.00
10.00	10.50	18.00	28.00	30.00
25.00	4.60	3.00	54.89	15.00
10.00	1.63	1.25	50.00	6.00
162.37	2.00	9.50	12.00	5.00
275.00	1.15	5.00	8.33	127.65*
[fol. 17]				
1,500.00	1.50	1.00	30.00	5.00
5.25	9.19	11.50	25.00	1.20
24.38	4.21	34.45	1.75	30.60
5.71	1.00	245.56	14.10	36.80s
1.00	1.00	19.76	5.00	200.00
3.00	14.00	36.77	25.00	26.14
1.40	1.00	2.00	10.50	15.12
1.70	1.00	1.45	3.60	2.00
5.20	20.60	77.69	18.03	25.00
9.20	1.75	1.00	5.00	2,100.00
13.75	1.75	29.45	7.07	12.00
3.60	10.90	3.95	10.00	.....
10.00	3.45	20.15	15.00	127.65
20.00	50.00	2.80	2.50	7,278.60
10.00	4.60	21.28	173.69	9,823.31*
1.80	12.00	2.50	20.70	.....
2.00	8.00	5.00	2,171.65s	.....
3.00	3.50	30.00	2,913.80	3,873.38
1.28	5.00	30.00	5,085.45*	57.00
22.80	2.50	25.35	39.00	3,816.38*
2.00	10.00	17.80	150.00	.....
12.50	2.19	1.00	26.45	.....
1.25	3.52	2.00	25.00	.....
5.00	3.78	2.85	91.00	5.00
15.00	100.00	4.50	2.00	37.39
10.00	1.00	7.00	68.17	1.60
2.55	5.00	5.15	384.05	10.86
2.70	7.69	2.00	407.80	1.00
7.60	13.16	1.00	61.09	1.15
10.00	2,913.80*	5.00	74.05	57.00*
17.95	1.00	1.40	21.64	.....
19.32	1.50	1.40	33.55	.....
2.80	1.15	4.90	60.42	.....
6.30	4.50	5.00	12.20	.....
3.00	1.00	8.70	10.34	9,823.31
1.00	4.15	6.65	212.60	3,875.64
3.00	1.00	21.30	1,679.36s	57.00
1.00	5.00	16.50	13.79	.....
1.00	5.00	10.20	500.00	6,004.67*
1.50	1.10	10.40	.....	.....
2.00	10.00	10.15	5,085.45	.....
1.00	5.75	12.50	7,278.60*	.....
8.14	9.20	19.25	8.00	.....

	Eastern Bank & Trust Co. on them			Citizens Bank & Trust Co. on them
7.79	153.80	8.30	1.35	.....
6.75	69.45	18.00	1.00	.....
38.60	.60	18.00	1.50	.....
8.50	5.88	15.80	2.00	.....
3.60	15.52	5.75	2.00	.....
5.00	21.76	.50	.60	.....
162.50	3.50	15.00	1.15	.....
2.58	3.50	6.56	4.00	.....
1.00	17.40	15.10	1.00	.....
20.00	5.79	2.00	2.40	.....
13.75	5.00	3.75	1.90	.....
19.01	5.00	4.35	3.20	.....
5.00	18.25	6.90	4.00	.....
1.50	27.00	7.95	1.05	.....
1.25	16.75	12.18	4.00	.....
6.40	40.11	100.00	7.50	.....
5.00	119.93	1.00	20.00	.....

[fol. 18] Cross-examination:

I did not make record; various tellers of bank made it; I go by the dates stamped on the sheets; never was in New Bern until I came down as Receiver; November 5th; bank had been closed about ten days; closed on 25th October. I came down November 5th.

Redirect examination:

According to records, before he added the $2100. Mr. Brinson had to his credit on 14th $1961.31; the $2100. was deposited October 14th; also, entry of $127.50 deposited 14th, making balance to his credit, Savings Account, $4188.81; October 21st withdrawal of $3964.60 left balance $224.21; there appears a credit in the Bond Account October 21st of $3964.60. The record shows credit entry of $3964.60 and a corresponding debit entry of $3964.60 on October 21, 1929.

Recross-examination:

That record (exhibited) is from daily sheets of the Tellers daily debits and credits and clearings of First National Bank of New Bern.

Redirect examination:

Credit entry was made to "Bond Account"; This account shows the credit and debit entries of bond transactions of

the First National Bank; shows credit entry October 21 of $3964.60.

Deposit slip October 14, 1929, Chas. J. Brinson, $2,100 Offered; exhibited.

[fol. 19] D. Ex. 3

The First National Bank

Deposited by Chas. J. Brinson

New Bern, N. C., 10/14, 1929.

In receiving items for deposit or collection, this bank acts only as depositor's collecting agent and assumes no responsibility beyond the exercise of due care. All items are accepted subject to final payment in cash or solvent credits. This bank will not be liable for default or negligence of its duly selected correspondents nor for losses in transit, and each correspondent so selected shall not be liable except for its own negligence. This bank or its correspondents may send items, directly or indirectly, to any bank including the payor, and accept its draft or credit as conditional payment in lieu of cash; it may charge bank any item before final payment, whether returned or not, also any item drawn on this bank not good at close of business on day deposited.

	Dollars	Cents
Currency		
Silver		
Gold		
Checks	2,100	00

Svgs. a/c—417.

Only deposit slip for like amount that date.

I have gone thru daily Teller's sheets, and checked the cash in Bank each day from the 12th to 25th October inclusive; and in doing this took the account of currency, coin and all the amounts of cash for purpose of making up total amount of cash at close of the day's business, on each day, and they are as follows:

[fol. 20]

October	12	$13,361.16
	14	22,831.13
	15	22,787.83
	16	29,578.31
	17	26,852.74
	18	24,865.92
	19	15,982.54
	21	22,246.43
	22	31,889.54
	23	32,767.54
	24	21,665.53
	25	14,658.18

The records show that the $2100 deposited by Mr. Brinson went into the cash items on that day; the records do not show that the $2100 deposited on October 14th went into the cash which I have read as of that date. The $2100 item was cleared with the Eastern Bank & Trust Company on October 15, 1929.

The defendant here offered the Clearing House Settlement marked defendant's exhibit 2, which is set out in the record.

(Witness was not allowed to testify to any conclusions as to what the records show.)

Plaintiff then offered in evidence Teller's sheet and clearance sheet, being the defendant's exhibits 5 and 6 as follows:

Same as Defendant's Exhibit 2.

The witness then stated: "That on October 15th the items drawn on the Eastern Bank were less than the items the Eastern Bank had drawn on the National Bank as shown by these statements by $5,801.00."

The plaintiff then offered in evidence Remittance sheets of the First National Bank to the Norfolk National Bank of Commerce & Trusts, of Norfolk, Va., for October 15, 1929, which is defendant's Exhibit 7, as follows:

[fol. 21] EXHIBIT 7

11,908.88*	Total									11,908.88
Oct. 15				9	Oct. 15					9
Nflk. National Bank of Commerce & Trusts					Norfolk National Bank of Commerce & Trusts					
Norfolk, Va.					Norfolk, Va.					
307	68	36	979.45					86,804		67.65
183			320.79					86,748		42.38
516			5.65					86,772		40.75
		86,125	72.81					86,770		55.92
		86,800	66.00					86,821		68.42
		86,822	97.61	66				85,872		132.90
		86,733	17.41					86,725		159.50
		85,854	157.61				613	68	45	180.30
		85,908	80.84							3,936.68*
		86,022	110.33				47	66	80	2.20
		85,810	85.12	66				68	36	2.20
		86,130	114.50					66	372	2.20
		86,807	63.25	66			1044	68	36	20.00
		85,627	42.64				183	68	123	16.80
		86,760	54.10				62	68	36	5,801.09
		86,759	29.90				35	68	123	51.80
		86,795	37.44				61	68	34	500.00
		85,811	102.77					85,818		55.73
		86,765	61.90					85,815		63.49
		85,817	54.43					85,819		54.01
		86,794	37.44					85,478		23.92
		86,013	53.02					85,475		71.12
		58,816	71.13					86,801		8.80
		85,813	63.51					85,974		51.12
		85,821	22.50					86,809		32.20
		85,814	57.56					86,753		61.90
		86,779	54.88	142				86,015		78.14
		85,620	20.14	27				85,975		9.15
		85,886	22.88	104				85,956		64.45
		86,741	100.22	1008				86,740		107.02
		86,792	52.20					85,476		26.00
		86,823	78.83					86,736		100.24
								86,790		35.50
								86,808		44.35
								86,817		18.88
								68	36	28.22
								68	123	140.17
								66	80	1.50
								68	70	500.00

The Remittance Sheet of the Norfolk National Bank of Commerce & Trusts of Norfolk, consisted of a number of items which show a total of $11,908.88, and on this sheet is an item of $5,801.09.

[fol. 22] The defendant then offered in evidence the entries on the General Ledger from October 1 to October 25th, inclusive, of the account of the Norfolk National Bank of Commerce & Trusts, and calls the Court's attention to the

fact that on the 15th day of October, 1929, the National Bank of Commerce & Trusts is credited with an item of $11,908.88 in this account, and the plaintiff by the same record calls the Court's attention that on the same date the First National Bank of New Bern received from the Norfolk National Bank of Commerce & Trusts $12,721.39. Entries introduced, viz.:

D. Ex. 4

Sheet No. 5.
Name of Account: —— ——.

Norfolk National Bank of Commerce & Trusts, Norfolk, Va.

Date	Description	Charges	Credits	Debit balance	Credit balanec
1929.					
Oct. 1	.....	8,140.53	3,382.28	4,574.38	.....
2	.....	3,319.31	13,115.06	.....	8221.37
3	.....	5,448.52	986.42	.....	759.27
4	.....	5,577.28	5,798.25	.....	980.24
5	.....	4,433.64	2,080.85	1,372.55	.....
7	.....	7,695.34	9,190.92	.....	123.03
8	.....	2,791.83	4,556.69	.....	1,887.89
9	.....	5,360.00	3,413.39	58.72	.....
10	.....	7,142.57	7,412.32	.....	211.03
11	.....	4,355.92	761.19	3,383.70	.....
12	.....	8,174.21	3,226.48	8,331.43	.....
14	.....	2,034.62	139.93	10,226.12	.....
15	.....	11,908.88	12,721.39	9,413.61	.....
16	.....	7,108.71	3,072.80	13,449.72	.....
17	.....	10,645.80	15,649.37	8.446.15	.....
18	.....	1,802.78	16,059.49	.....	5,810.56
19	.....	7,784.03	1,746.02	227.45	.....
21	.....	4,000.01	10,065.07	.....	5,837.61
22	.....	11,365.89	11,306.77	.....	5,778.49
23	.....	2,155.05	2,557.36	.....	6,180.80
24	.....	4,442.57	4,079.70	.....	5,817.93
25	.....	5,764.88	917.15	.....	970.20

The witness further testified: "In making my tabulation of the cash on the dates mentioned, I only counted and included in this amount the gold, currency, silver and minor [fol. 23] coins, I did not include the cash items represented by unpaid checks on hand.

On cross-examination the witness stated: "The record does not show that on the 15th of October 1929, the First National Bank received from the National Bank of Commerce & Trusts a larger sum than it remitted; these were drafts drawn against the account, one the debit and the other the credit charges, which shows that on October 15th, the First National Bank remitted to the Norfolk National

Bank of Commerce & Trusts $11,908.88, and on the same day issued its drafts against their account to the amount of $12,739.21, balances shown as $9413.61 exchanges made between banks by clearing for convenience to avoid transferring currency. The same day this $2100 was deposited, the National Bank received from the Eastern Bank & Trust Company drafts on Norfolk for $5801.09, being the clearance balance; funds in the National Bank were not included up to that amount it was paper debits and credits; not the same thing as passing money. The Eastern Bank was solvent so far as I know; it was a debit and credit transaction. The item was not drawn on the First National Bank; it went into the First National; they have three or four tellers in the First National, each man had his own cash. For that particular day, these sheets represent the aggregate of the three tellers' cash, currency and minor coin. The paper, Plaintiff's Exhibit 1, is in Mr. Caroon's handwriting. The numbers on remittance letters show how clearance is had and each bank has a number, one of those is the number of the Eastern Bank and the other the National Bank of Commerce."

Redirect examination:

"The total of the Tellers' sheets shows total money in bank, cash includes gold, currency, silver and minor coins; no unpaid checks or paper memorandum included. The records show credit to Mr. Brinson's account by debit and credit entries passing through channels of the Bank; the records do not show that the $3964.60 was charged by the Bank to buy bonds; that receipt, Plaintiff's Exhibit 1", signed by Caroon."

[fol. 24] The plaintiff is recalled and testified as follows: "Mr. Motter was the first man that come here and took charge of the First National Bank after it failed. I had no control over the way the First National Bank handled this money after I turned it over to them; I put it there to buy bonds and he was to get me U. S. registered bonds."

Evidence closed.

MOTION TO DISMISS

At the close of all the evidence, the defendant moved for a Decree dismissing the Bill, for that:

1. Complainant failed to show augmentation of funds maintained;

2. Complainant fails to trace any portion of the fund into the hands of the Receiver.

The Court took cause under advisement, and on December 29, 1930, entered decree, as appears of record, declaring complainant entitled to recover $3,964.60 as set out in said decree,

To which decree the defendant excepted and gave notice of appeal, in accordance with the Court rules.

Exception No. 1.

ORDER SETTLING BILL OF EXCEPTIONS

The foregoing is allowed and will be filed as the Bill of Exceptions on appeal in this cause.

This March 23, 1931.

I. M. Meekins, United States District Judge.

[fol. 25] IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NORTH CAROLINA, NEW BERN DIVISION

No. 297

CHARLES J. BRINSON

vs.

RAYMOND E. SCHUMACHER, Receiver of the First National Bank of New Bern, N. C.

JUDGMENT—Filed Dec. 29, 1930

This cause coming on to be heard before His Honor I. M. Meekins, Judge, at the Special December Term 1930 of the United States District Court for the Eastern District of North Carolina, New Bern Division, and being heard by the Court, the Court finds the following facts from the evidence to-wit:

That the First National Bank of New Bern was a banking corporation duly chartered under the laws of the United States and conducted a general banking business in the City of New Bern prior to the twenty-sixth day of October, 1929, and on said date, said banking institution became insolvent and closed its doors, and the defendant Raymond E. Schumacher was duly appointed by the Comptroller of the Currency and qualified as Receiver of said bank, and has since said time continued to act as such Receiver; that at the time of his appointment and qualification, the said defendant Schumacher took over and has since said time had in his hands all of the assets of the aforesaid banking institution;

That on or about the nineteenth day of October, 1929, the plaintiff delivered to the said First National Bank of New Bern Thirty-nine Hundred Sixty-four and 60/100 ($3964.60) Dollars in cash, or its equivalent, and directed and requested the said First National Bank to buy for him and for his account four thousand dollars in par value of United States Government bonds, Fourth Liberty Loan 4¼%, to be registered bonds in his name, and the said Bank [fol. 26] undertook and agreed to accept and did accept said money for the purchase of such bonds for the plaintiff, and wrongfully failed and neglected to do so but commingled said funds with other funds in said Bank, advising the plaintiff that the bonds had been purchased in accordance with his directions and would be received in a few days, and continued to hold the plaintiff's money so commingled with the other funds in said Bank until the said First National Bank was closed and placed in the hands of the defendant Receiver on or about the twenty-sixth day of October, 1929; the said sum of Thirty-nine Hundred and Sixty-four and 60/100 ($3964.60) Dollars so placed in said Bank and wrongfully commingled and misapplied, was delivered to said Bank under the expressed direction and agreement for the purchase of the bonds aforesaid for the plaintiff and for no other purpose, and after said money was so accepted by the Bank, it did not order or deliver the bonds to the plaintiff; and that the assets of said bank were increased and augmented by plaintiff's money to the full extent of Thirty-nine-Hundred Sixty-four and 60/100 ($3964.60) Dollars.

That after the moneys of the plaintiff was so placed in

the Bank for the purpose aforesaid and wrongfully and unlawfully commingled by the said Bank with its other funds, the said Bank at all times thereafter until it was closed and placed in the hands of the defendant Receiver, had more than sufficient cash on hand to pay the amount due the plaintiff and at the time the Receiver took charge of said Bank, took and accepted among the assets of said Bank more than sufficient amount in cash to pay the amount due to the plaintiff, and still has from the assets of said bank more than a sufficient sum in cash to pay the same.

It is thereupon considered, ordered and adjudged by the Court that the plaintiff have and recover of the defendant Raymond E. Schumacher, Receiver of the First National Bank of New Bern the aforesaid sum of Thirty-nine Hundred Sixty-four and 60/100 ($3964.60) Dollars, the trust sum belonging to the plaintiff by reason of the special deposit aforesaid, and said Receiver is directed to pay the same in full out of the funds coming into his hands as such [fol. 27] Receiver of the First National Bank of New Bern;

It is further considered, ordered and adjudged by the Court that the defendant will pay the costs of this action to be taxed by the Clerk.

I. M. Meekins, United States District Judge.

To this decree the defendant objects and excepts.

Meekins, Judge.

Entered and filed this December 29th, 1930.

In United States District Court

Assignment of Errors

(Style of court and title omitted)

Now comes, defendant, above, by his solicitors, and says that the decree herein entered December 29, 1930, is erroneous, and files, with his petition for appeal his assignment of errors, as follows:

1. The Court in overruling defendant's motion for decree dismissing the action, for that (a) complainant, by the uncontradicted evidence, failed to show that any part of al-

leged funds came into the Receiver's, defendant's hands; it contrarywise appearing specifically that, at least, $2100 thereof "was wiped out in the Norfolk National Bank of Commerce & Trust; and, (b) Complainant, utterly failed to show any augmentation of assets, or maintainance thereof, between date of complainant's alleged deposit and suspension of Bank's business: the uncontradicted evidence (offered by complaint) being that assets taken over by Receiver were less than at time complainant deposited his funds—which he alleges were "intermingled," as found by Court;

2. The court erred in holding that any part of the $2100 ever came "as cash" into said National Bank—the uncon- [fol. 28] tradicted evidence being that 'twas represented by check of complainant on Eastern Bank & Trust Company, and was cleared thru Norfolk Bank. And no effort is made, in decree (or any "finding of fact" or "law"), to distinguish between the $2100, the $1,961.31 already on deposit, and the $127.50—

3. The Court errs in conclusion in decree in that (a) the fund is treated as "trust fund" (referring to the deposit of $2100 on October 14th) and "as special deposit"—the holding being applied as well to the fund on deposit prior to alleged creation of "the trust," and (b) no distinction is indicated as to "fact" on which "conclusion" is made to rest:

4. The Court erred in holding that "said Bank at all times thereafter until it was closed and placed in hands of defendant Receiver, had more than sufficient cash on hand to pay the amount due plaintiff" and "at time Receiver took charge, took and accepted among the assets of said bank more than sufficient to pay the amount due to plaintiff", and "still has from the assets of said bank more than sufficient sum in cash to pay the same," for that (a) such conclusion is contrary to the uncontradicted evidence; (b) complainant offered no evidence to show that the Receiver ever received any portion either of the $1961.31, or the $2100; (c) contrarywise it appears that said funds were "intermingled", and diverted;

5. The Court erred in holding complainant entitled to preferred payment, for that (a) Complainant utterly fails

to trace any portion of his claimed funds into Receiver's hands; (b) the Bank's records disclose no augmentation, maintained, by reason of complainant's deposit; (c) the funds were dissipated, and never reached the Receiver's custody;

6. The court erred in not "finding the facts specifically and stating separately its conclusions of law thereon"; the decree being supported by incorrect application of the law to facts—stated unsupported by any evidence.

7. The court erred in not finding, from the uncontradicted [fol. 29] evidence (and complainant's own testimony) that said funds have not been traced into the Receiver's hands; that said funds were dissipated at suspension of the Bank; that said deposit did not augment the Bank's assets; that said funds never got into the Bank's "cash."

8. The Court erred in signing any decree for complainant; the whole, uncontradicted evidence,—upon proper finding of facts—compelling conclusion of law contrary to complainant's contentions.

Wherefore, defendant prays that the said decree of the said United States District Court may be corrected and reversed.

This 24th day of February, 1931.

Respectfully submitted,

J. O. Carr, Julius F. Duncan, Solicitors for Appellant, Defendant, Receiver.

IN UNITED STATES DISTRICT COURT

MEMORANDUM UNDER SEC. 7, RULE 14 AND RULE 23

(Style of court and title omitted)

1. Petition for appeal, dated February 24, 1931;
2. Copies of petition, with bill of exceptions and asssignment of errors, furnished appellee's counsel 26th February, 1931 (original notice Feb. 24th, 1931 transmitted);
3. Order allowing appeal March 23, 1931;
4. Citation dated March 23, 1931;
5. Service of citation March 27, 1931;

[fol. 30] 6. Appeal bond, date: March 23, 1931; Penalty $250.00; Raymond E. Schumacher, as Receiver of First National Bank of New Bern, N. C. and Judson C. Jones, obligors; conditioned for payment of costs;

7. Order enlarging time from May 1, 1931 to May 15, 1931 for docketing case and filing record thereof with Clerk of the Circuit Court of Appeals, of fourth circuit.

S. A. Ashe, Clerk, by Geo. Green, Deputy Clerk.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 31] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 3183

R. E. SCHUMACHER, Receiver of the First National Bank of New Bern, Appellant;

versus

CHARLES J. BRINSON, Appellee

Appeal from the District Court of the United States for the Eastern District of North Carolina, at New Bern

May 6, 1931, the transcript of record is filed and the cause docketed.

Same day, the original notice of appeal, petition for appeal, order allowing appeal, bond and citation are certified up under Sec. 7 of Rule 14.

Same day, order enlarging time to file record is filed.

Same day, the appearance of Julius F. Duncan is entered for the appellant.

May 9, 1931, the appearance of J. O. Carr is entered for the appellant.

May 13, 1931, the appearance of L. I. Moore is entered for the appellee.

May 18, 1931, twenty-five copies of the printed record are filed.

[fol. 32] Argument of Cause

July 1, 1931 (June term, 1931), cause came on to be heard before Parker, Northcott and Soper, Circuit Judges, and is argued by counsel and submitted.

IN UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 3183

R. E. SCHUMACHER, Receiver of the First National Bank of New Bern, Appellant,

versus

CHARLES J. BRINSON, Appellee

Appeal from the District Court of the United States for the Eastern District of North Carolina, at New Bern

(Argued July 1, 1931. Decided October 12, 1931)

Before Parker, Northcott, and Soper, Circuit Judges

Julius F. Duncan (J. O. Carr on brief) for Appellant, and L. I. Moore (Moore & Dunn on brief) for Appellee.

OPINION—Filed October 12, 1931

[fol. 33] PARKER, Circuit Judge:

This is an appeal by the Receiver of the failed First National Bank of New Bern, N. C., from a decree holding that the funds coming into his hands were charged with a trust in favor of the complainant, Charles J. Brinson, to the extent of $3,964.60, and directing that he pay this amount to complainant from such funds. The complainant contends that he intrusted $3,964.60 to the bank for the purchase in his behalf of United States bonds which the bank failed to purchase. The receiver admits that complainant had this amount on deposit in the bank and that his account was charged with the amount under a promise to apply same in the purchase of bonds for him; but denies that the assets of the bank were augmented as a result thereof or that complainant has traced any moneys held in trust for him into funds coming into the hands of the receiver.

The facts are that the failed bank was engaged in the business of purchasing bonds for its customers and kept a regular account of funds delivered to it for that purpose. On October 10, 1929, complainant arranged with the

officials of the bank to purchase bonds for him and was advised to bring in the necessary money and they would be purchased. He already had $1,961.31 on deposit to his credit and on October 14th, to provide the additional funds necessary, he deposited to his account $2,100.00, in the form of a check drawn on the Eastern Bank & Trust Company. On October 19th he was notified that his account had been charged with $3,964.60 for the purchase of the bonds, and the records of the bank show that his account was actually charged with this amount on October 21st, and that on the same date the bond account was credited with a deposit of a like amount. The bonds were never in fact purchased, and the bank closed its doors on October 26th.

At the time of the closing of the bank its cash and cash items amounted to $27,963.98, of which $14,658.18 was actual cash. On October 14th cash and cash items were $44,947.46 and cash $22,831.13. On October 19th they were $32,589.51 and $15,982.54, respectively. On October 21st they were $42,232.39 and $22,246.43. At no time during the period in question did cash and cash items fall below $27,000.00 or actual cash below $14,000.00.

[fol. 34] With respect to the $2,100.00 check drawn by plaintiff on the Eastern Bank & Trust Company, it appears that this was used by the failed bank in a clearance on October 15th, in which the failed bank received from the Eastern Bank & Trust Company $5,801.09 over and above the items which that bank presented against it. This $5,801.09 was in turn used by the failed bank in clearing with the Bank of Commerce & Trusts of Norfolk, and its balance with that bank, after the clearance, was exceeding $10,000.00.

It would seem clear that as a result of the deposit by plaintiff of the $2,100.00 check the assets of the failed bank were augmented by that amount at the time; but we need not go into this matter, as we are satisfied that upon an entirely different principle complainant is entitled to the relief which he seeks. He unquestionably had to his credit on October 19th more than enough money to pay for the bonds. On that date the bank agreed to charge his account with the amount necessary to make the purchase and to use the funds so derived for that purpose. It actually did so charge his account, at the same time crediting its bond account with a like sum. When these transactions occurred

it had in its vaults cash far in excess of the amount necessary for the purchase of the bonds; and we think that as a result of the agreement a trust was impressed upon this cash to the extent of the amount necessary to make the purchase.

There can be no question but that if complainant had actually paid over the cash necessary to purchase the bonds, the bank would have taken same as a trust fund, and if it had mingled same with the cash in its vaults, the whole would have been impressed with a trust in favor of complainant to the extent of the trust fund received. See Schumacher, Receiver, vs. Harriett, this day decided, — Fed. (2nd) —. It can make no difference that, instead of cashing a check and then delivering the money to the bank for the purchase of the bonds, he allowed his account to be charged with the amount necessary. The bank had on hand funds more than sufficient for the purpose, and by the agreement with complainant they were impressed with a trust in his favor. Davis vs. McNair, (C. C. A. 5th) 48 Fed. (2nd) 494; State vs. Grills, 35 R. I. 70, 85 Atl. 281, 283; Northwestern Lumber Co. vs. Scandinavian-American [fol. 35] Bank, 130 Wash. 33, 226 P. 825, 829; State vs. Exchange Bank of Bristow, 112 Neb. 834, 201 N. W. 895, 896.

In State vs. Grills, supra, 35 R. I. 70, 85 Atl. 281, 283, the rule applicable in such case is well stated as follows:

"The ordinary relation of a banker and his customer is that of debtor and creditor as to the deposits made by the customer with the banker. This relation, arising upon a general deposit, may be changed as to the whole or a part of such general deposit. Without actual delivery to the customer, and a redeposit by him for a special purpose, such general deposit by agreement may be converted into a special deposit and become a fund in the hands of the banker with which he is intrusted for the specific purpose named in the agreement creating the special deposit. Such fund is impressed with a trust, the violation of which is a fraud."

The reason underlying the rule is that, by agreement between the parties, a general deposit may be converted into a special deposit (Morse on Banks and Banking, 6th

Ed., Vol. 1, Sec. 188, p. 575), and that a special deposit is in the nature of a trust toward which the bank occupies the position of a trustee. In re Gans & Klein, 14 Fed. (2nd) 116, 117; Morse on Banks & Banking, 6th Ed., Vol. 1, Sec. 325, p. 757; 3 R. C. L. 558.

In Davis vs. McNair, supra, the facts were very similar to those in the case at bar. A bank had agreed to purchase bonds for a depositor and to charge same against his deposit account. The funds on deposit were more than sufficient to pay for the bonds; and the amount necessary to pay for same was by agreement withdrawn from the checking right of the depositor. In holding that a trust was created, the Circuit Court of Appeals, speaking through Judge Walker, said:

"The arrangement between the plaintiff and the bank with reference to buying the Liberty bonds would not have been substantially different in effect if the plaintiff had checked out the amount on deposit to his credit and had then delivered that amount in cash to the bank upon the latter's agreeing to use that sum in buying the Liberty bonds desired by plaintiff. By what was done the relations of the parties with respect to the funds were so changed [fol. 36] that thereafter the deposit was in the nature of a special one, having the trust feature of a special deposit."

It should be noted that we are not dealing with a trust asserted on the ground that the assets of the bank have been augmented by a payment made to it. In such cases it is held that the receipt by the bank of a check drawn against the account of a depositor does not augment its assets. Ellerbe vs. Studebaker Corporation of America, 21 Fed. (2nd) 993, 995, and cases there cited. What we have is in effect an agreement by the bank that a definite amount of the funds in its possession shall be held in trust for a specified purpose. In other words, what the record discloses is, not a shifting of credits, but the creation of a trust with respect to funds already in the bank's possession.

On the same principle the case is to be distinguished from that which would have been presented by a mere breach of agreement on the part of the bank to purchase bonds for complainant. If nothing more had occurred than that the

bank had agreed to purchase bonds for him to be paid for later out of funds on deposit, it may well be that no trust would have arisen. But something more did occur. The bank charged his account with the price of the bonds and credited its bond account with the amount charged. In other words, it paid to itself the money necessary for the purchase of the bonds and charged itself with same as trustee. As it had in its vaults the funds to carry through the transaction as entered on its books, and as equity regards that as done which should have been done, funds to an amount necessary to purchase the bonds must be deemed to have been held in trust for that purpose.

As stated above, the cash funds in the bank never fell below what was necessary to discharge this trust. It is clear, therefore, that the funds which passed into the hands of the receiver were impressed with a trust to that extent in favor of complainant. Schumacher, Trustee, vs. Harriett, supra; Poisson vs. Williams, Receiver, 15 Fed. (2nd) 582.

The decree of the court below will be affirmed.

Affirmed.

[fol. 37] IN UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 3183

R. E. SCHUMACHER, Receiver of the First National Bank of New Bern, Appellant,

versus

CHARLES J. BRINSON, Appellee

Appeal from the District Court of the United States for the Eastern District of North Carolina

DECREE—Filed and entered October 17, 1931

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of North Carolina, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court, in this cause, be, and the same is hereby, affirmed with costs.

October 17, 1931.

John J. Parker, Senior Circuit Judge.

[fol. 38] In United States Circuit Court of Appeals

Memorandum as to Mandate

On another day, to-wit, November 17, 1931, the mandate of this Court in this cause is issued and transmitted to the United States District Court at New Bern, North Carolina, in due form.

Same day, the original notice of appeal, petition for appeal, order allowing appeal and bond are returned to the Clerk of the District Court at New Bern, North Carolina.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 39] Supreme Court of the United States

Order Allowing Certiorari—Filed February 23, 1932.

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 36,453. U. S. Circuit Court of Appeals, Fourth Circuit. Term No. 639. L. J. Blakey (successor to R. E. Schumacher), receiver of the First National Bank of New Bern, New Bern, North Carolina, petitioner, vs. Charles J. Brinson, ~~receiver~~. Filed January 16, 1932. File No. 36,453.